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No. 79-1017

In the Supreme Court of the United States

OCTOBER TERM, 1979

CHARLES SORKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court did not issue an opinion. The opinion of the court of appeals (Pet. App. 1a-3a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1979, and a petition for rehearing was denied on November 28, 1979 (Pet. App. 4a-5a). The petition for a writ of certiorari was filed on December 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission of evidence outside the bill of particulars deprived petitioner of a fair trial.

2. Whether the admission of irrelevant evidence deprived petitioner of a fair trial.

3. Whether petitioner was prejudicially misled during trial into believing that the government would permit him to enter a guilty plea to a lesser offense.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of willfully aiding in the preparation of false tax returns of the Mutual Advancement Corporation ("MAC") for 1973 and 1974, in violation of 26 U.S.C. 7206(2).[1] The district court sentenced him to a three-month term of imprisonment and a $10,000 fine. It also placed petitioner on probation for three years and assessed the costs of prosecution. The court of appeals affirmed (Pet. App. 1a-3a).

The pertinent facts are as follows: In the late 1960's, the United States Department of Labor initiated a manpower training program to provide job opportunities and training for the hard-core unemployed. Under this program, the Labor Department entered into contracts with private industry in which the employer agreed to hire and train a given number of hard-core unemployed persons. The Labor Department would then reimburse the employer for one-half of the employee's salary and for all the costs of the on-the-job training (R. 49-72).[2]

In the early 1970's, Thomas Carlough, petitioner's co-defendant, and Alan Rubin formed MAC to operate manpower training programs as a subcontractor for employers who obtained these federal contracts.

[1]Thomas J. Carlough, Executive Director of MAC, was indicted for the same offense for 1972-1974 and tried and convicted together with petitioner. The court of appeals also affirmed Carlough's conviction. He has not sought review in this Court.

[2]"R." refers to the trial court record.

Petitioner served as accountant and legal advisor to MAC and its affiliated companies (R. 540-541).

The indictment alleged that MAC's federal income tax returns for 1972-1974 contained false deductions for salaries, wages, and pensions, as well as false deductions for business expenses for consulting, educational, and ancillary services allegedly provided to MAC (A. 3-4).[3] The government provided petitioner and Carlough with a bill of particulars and a supplementary bill of particulars, in which it named the three companies involved in MAC's listing of false deductions for consulting, educational, and ancillary services. The bills of particulars further specified that MAC had claimed false and fraudulent wage and pension deductions for six named persons listed on MAC's payroll, none of whom were actually employed by MAC (A. 5-6, 14-17).

At trial, the government presented the testimony of four individuals (Soresi, Puro, Clinton and Thomas) who were on the payroll of MAC and whose sole or principal activity was union organizing. These people did not work for MAC, and the evidence established that the payroll and pension deductions taken on MAC's income tax returns for them were false (R. 275-281, 284, 291-294, 373-374, 378, 749).

Kenneth Caiazzo also testified at trial. Although Caiazzo was not named in the bill of particulars as one of the individuals for whom MAC took false wage and pension payment deductions, Caiazzo testified that he did not perform any work for MAC and in fact never received any salary from MAC. On cross-examination,

[3]"A." refers to the appendix filed by the petitioner in the court of appeals.

he testified that John Commarato, an employee of MAC, asked him if his name and social security number could be used on MAC's payroll. Although Caiazzo did not deal directly with either Carlough or petitioner, the evidence established that MAC claimed false payroll and pension deductions for Caiazzo (R. 892).

The government also produced evidence concerning deductions taken for payments to Key Delta Corporation, Advanced Air Corporation, and Modern Sheet Metal Supply Co. Key Delta was formed in 1973 by Carlough, Lawrence Howard, and Charles Saunders. Petitioner served as that corporation's accountant (R. 398, 401, 769-770). In order to meet Key Delta's operating expenses, Carlough from time to time gave Howard MAC checks, which totalled $67,500. These checks were prepared at the direction of Carlough or petitioner, and Howard understood them to be loans to Key Delta (R. 409). Despite the fact that Key Delta provided no services to MAC, the $67,500 in checks, pursuant to the directions of Carlough or petitioner, were recorded in the MAC books and records as disbursements both for consulting services and for educational and ancillary services (R. 91-93, 178-179, 214-215, 219-223, 554). Subsequently, in 1974, Key Delta went out of business and its equipment was sold at auction. The auctioneers then issued a check to petitioner for $69,780.45. This check was negotiated by Andrew Sauer, a bank officer, through his personal bank account as an accommodation to Carlough and petitioner, and some $69,000 in cash was delivered to Carlough. Although petitioner was out of the country on the date the check was negotiated, he subsequently thanked Sauer for his help (R. 412, 414, 476; Govt. Exh. 22). Similar evidence was presented in regard to Advanced Air Corporation and Modern Sheet Metal

Supply Co. (R. 216, 239-243, 245, 248-252, 335-336, 343-344, 604-606, 645, 653-654, 656-657, 661, 663, 692; Govt. Exs. 12, 17-18, 24, 26, 36-37).

ARGUMENT

1. Petitioner first argues (Pet. 7-30) that the testimony of Rullo, Pinello, Solomine, Caiazzo, and Sauer was outside the bill of particulars and that its admission was prejudicial.

Rullo, Pinello, and Solomine were union officers and full-time employees of another corporation. They had introduced Carlough to officials of that corporation in order that Carlough might convince the corporation to participate in a MAC training program. MAC paid Rullo, Pinello, and Solomine a total of $31,000 for this introduction (R. 711-734). The payments received by them, however, were not claimed to be false and fraudulent at trial. Accordingly, their testimony did not depart from the bill of particulars, which purported to list only those employees with respect to whom MAC had claimed deductions on the tax returns of MAC for payments although no such payments had been made.

Petitioner further argues (Pet. 11, 13, 30) that the testimony of Caiazzo and Sauer[4] was also outside the bill of particulars and could have been used by the jury to convict him. We do not dispute the fact that these witnesses were omitted from the bill of particulars. But this omission does not require reversal of petitioner's conviction. The function of a bill of particulars is not to preclude the admission of incriminating evidence, but

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[4]Sauer, a former bank official, testified as to various dealings he had had with petitioner and/or Carlough, and identified a number of checks which had been negotiated through him.

rather to inform the defendant of the charge against him with sufficient precision so that he can prepare his defense and avoid, or at least minimize, surprise at trial. *United States* v. *Sherriff*, 546 F. 2d 604 (5th Cir. 1977); *United States* v. *Glaze*, 313 F. 2d 757 (2d Cir. 1963).

Thus, contrary to petitioner's argument, a bill of particulars cannot be used to obtain a list of the government's witnesses. *United States* v. *Johnson*, 504 F. 2d 622 (7th Cir. 1974). Nor is there any constitutional requirement that the prosecution reveal before trial the names of all witnesses who will testify unfavorably. *Weatherford* v. *Bursey*, 429 U.S. 545 (1977). Finally, where a defendant is surprised at trial by evidence outside a bill of particulars, any unfair surprise can be remedied by a continuance. *United States* v. *Glaze*, *supra*, 313 F. 2d at 760. Here, despite ample opportunity to do so,[5] petitioner did not ask for a continuance to enable him to meet this evidence. He cannot now contend that he was prejudiced by the admission of evidence outside the bill of particulars.

We therefore do not agree with the court of appeals' observation (Pet. App. 2a) that the prosecutor's omission of these witnesses' names from the bill of particulars "was improper and evidenced a lack of appreciation for his responsibility as an officer of the court." But the court correctly concluded (Pet. App. 3a) that the error was harmless in light of the overwhelming independent evidence of petitioner's guilt established by proof of the false deductions for non-existent payments to Key Delta, Advanced Air and Modern Sheet Metal (see pages 4-5, *supra*). From this evidence alone, the

[5]Petitioner had approximately 14 days after Sauer testified and 7 days after Caiazzo testified within which to subpoena rebuttal witnesses or documentary proof (Pet. App. 3a).

jury could only have concluded that petitioner played an active part in claiming false deductions on MAC's tax returns. Petitioner was therefore not prejudiced by the omission of Caiazzo and Sauer from the bill of particulars.

2. Petitioner also contends (Pet. 18-28) that the testimony of Sauer and the exhibits introduced through his testimony were irrelevant and should not have been admitted into evidence. Although the court of appeals concluded that some of Sauer's testimony and supporting documents were relevant,[6] it observed that "the needless introduction by the * * * [prosecutor] of extensive evidence (*e.g.*, portions of the testimony of Sauer and exhibits introduced through him) which was both confusing and of doubtful relevance indicates a possible lack of judgment and experience" (Pet. App. 2a-3a). But given the overwhelming evidence of petitioner's guilt (see pages 3-5, *supra*), the court of appeals correctly ruled that any error in the admission of irrelevant evidence was likewise harmless.

Jackson v. *Denno*, 378 U.S. 368 (1964), upon which petitioner relies (Pet. 13), does not support his claim that if improper or inadmissible evidence goes before the jury, any ensuing guilty verdict must be reversed because it is impossible to determine from a general verdict the evidence upon which the jury decided to rest its verdict. The concern in *Jackson* was that the jury might have relied upon an involuntary confession (which manifestly was not irrelevant). But where, as here, the error merely

[6]Contrary to petitioner's claim (Pet. 18-28), much of Sauer's testimony directly related to the false deductions claimed for payments to Key Delta, Advanced Air and Modern Sheet Metal, and was clearly relevant (see, *e.g.*, Govt. Exhs. 18, 20, 21-24, 26).

involves the admission of irrelevant evidence and there is no showing of any risk of substantial prejudice, there is no basis for reversing the conviction.

3. Finally, petitioner contends (Pet. 30-34) that he was prejudiced by the government's refusal to accept a plea to a misdemeanor at the close of the trial, asserting that he was "lulled" into believing that the plea would be accepted. As a result, according to petitioner, his attorney did not adequately prepare his summation to the jury and petitioner did not testify as forcefully as he could have done.

But the record convincingly refutes petitioner's claim. During the discussions concerning a possible plea, including those that occurred near the close of trial, the government attorney indicated that any final decision with respect to a plea had to have his supervisor's approval. Indeed, the conditional nature of the plea bargain is candidly admitted by the affidavit of petitioner's attorney, Mortimer Todel (A. 35). Thus, this case is markedly different from *Cooper* v. *United States*, 594 F. 2d 12 (4th Cir. 1979), upon which petitioner relies (Pet. 32), where the plea proposal was made without any reservation expressed regarding a supervisor's approval (594 F. 2d at 19). Here, in contrast, there was no firm offer of a plea at any time.[7]

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[7]Petitioner has not alleged, much less established, either why his attorney could not have sought to have recalled him to testify when he learned that the tentative plea bargain would not be consummated or why he could not have asked for a continuance so that he could adequately prepare his summation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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